147 U.S. 687

RECORD, CASE NO. 14519.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 673.

THE UNITED STATES, APPELLANT,

vs.

JOHN W. PAYNE.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 14, 1891.

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1 IN THE COURT OF CLAIMS.

JOHN W. PAYNE
vs.
THE UNITED STATES. } No. 16034.

I.—*Filing of original petition and of amended petition.*

The original petition in this case was filed Feb'y 23, 1888. By leave of court an amended petition was filed and substitued for said original petition January 3, 1890.

II.—*Amended petition filed January 3, 1890.*

To the honorable judges of the Court of Claims:

Your petitioner, John W. Payne, a citizen of the United States, and a resident of Greensboro, in the State of North Carolina, respectfully shows:

That from the 23rd day of March, 1882, to the 30th day of June, 1889, he was clerk of the United States district & and circuit courts for the western district of North Carolina, duly qualified, and acted as said clerk.

That your petitioner presented to the accounting officers of the Treasury for payment his accounts for services as said clerk from the 23rd day of March, 1882, to the 30th day of June, 1889, sworn to and duly approved by the court, as required by the act of February 22, 1875, 18 Stat.
2 L., 333; that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit "A," herewith attached.

Petitioner claims that, in accordance with the provisions of section 828 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid, and approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment of said fees, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to anyone for him, nor has any part of the same been allowed to him in any way, as a credit, or set-off by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court in accordance with law.

Your petitioner furthers avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation, if said fees were added, would not exceed the maximum compensation of $6,000 for any one year.

Wherefore, your petitioner prays judgment against the defendant for $675.25, with interest and costs.

JOHN W. PAYNE.

By his attorney:
C. C. LANCASTER,
Washington, D. C.

8525

3 *Exhibit A.*

United States of America, Dr., To John W. Payne, clerk of the United States district and circuit courts for the western district of North Carolina, at Greensboro, for services on behalf of the United States, to wit:

1. For entering separate order of court for the payment of each juror and witness, one folio each, at 15 cents per folio, and making copy of said order for each juror and witness for the marshal to pay, disallowed, as follows:

Report 73,060	$39.95

2. For making dockets and indexes, taxing costs, &c., in various suits on manufacturer's bond under the internal revenue law, where issue was joined and testimony given, at $3.00 each, $1.00 allowed, and $2.00 in each case disallowed, as follows:

Report 73,060	$82.00
Account B	98.00
	$180.00

3. For recording judgments of court in certain cases, at 15 cents per folio, in addition to making an entry of same on minute book, disallowed, as follows:

Report 76,433	$3.20

4. For making a record of appearance of judge, marshal, and U. S. district attorney in various cases, one folio each, at 15 cents per folio, disallowed, as follows:

Report 76,433	$2.70
" 94,494	.60
" 95,735	.30
" 97,739	.60
	$4.20

4 5. Entering orders of court for alias fi. fa., venditioni exponas, one folio each, at 15 cents per folio, and issuing alias fi. fa., venditioni exponas, at $1.00 each, in various cases, disallowed, as follows:

Report 75,669	$18.40
(See account C.)	
Report 104,286	2.55
" 104,285	2.40
	$23.35

6. For making record entries of recognizance of defendants and drawing recognizance, at 15 cents per folio, disallowed, as follows:

Report 80,317	$1.80
" 98,480	7.35
" 104,285	1.95
	$11.10

7. For making dockets and indexes in cases on sci. fa. and other proceedings where issue was joined but no testimony given, $2.00 in each case, $1.00 disallowed, as follows:

Report 80,317	$4.00
" 94,494	2.00
	$6.00

8. For entering and filing each separate voucher in the duplicate accounts of U. S. marshal, at 10 cents each, disallowed, as follows:

Report 84,907	$17.00

9. For entering orders of court approving accounts of marshal, district attorney, clerks of court, and commissioners to be forwarded to the accounting officers of the Treasury Department, and filing duplicate accounts, disallowed, as follows:

Report 92,614	$38.45
" 97,739	38.00
" 98,479	2.20
" 98,480	5.00
	83.65

5 10. For attendance on the district court, September 15, 1883, with the jury commissioner in drawing juries, disallowed, as follows:

Report 84,907	$5.00

11. For filing and certifying three copies of printed rules of court, by order of court, disallowed, as follows:

Report 94,494	.75

12. In case U. S. vs. John W. Jessup et al., and fourteen following cases; in case U. S. vs. John T. Willey et al., and four following cases, charges for certificates and seals to copies of writs in each case for marshal to serve, disallowed, as follows:

Report 94,494	$26.85
" 95,735	1.75
" 98,480	3.20
" 104,285	4.90
" 104,286	8.70
" 109,731	1.29
" 112,515	2.40
" 115,426	25.20
	74.20

13. For making report to collector of internal revenue, at 15 cents per folio, disallowed, as follows:

Report 95,735	$7.10

14. For entering separate orders of court excusing jurors; entering orders of court to issue subpœnas; entering motion to set aside judgment; enrolling judgment; entering order for alias copias; entering order for continuance; entering order for discharge of defendant; entering order for fi. fa., disallowed, as follows:

Report 95,735	$5.55
" 97,739	2.70
" 98,480	9.20
" 101,785	11.40
" 104,285	5.40
" 104,286	.45
" 112,515	.60
	35.30

6 15. For entering and filing thirty-five notices of marshal notifying talesmen to appear as jurors at the October term, 1885, at 10 cents each, disallowed, as follows:

Report 95,735	$3.50

16. For entering and filing "other papers," entering and filing separate papers in cases sent up to court by commissioners, at 10 cents each, disallowed, as follows:

Report	95,735	$6.00
"	98,480	1.80.70
"	107,836	9.90
"	104,285	18.20
"	104,286	19.00
"	108,417	22.20
"	112,515	13.40
		107.40

17. In case U. S. vs. Manley Buckner, making dockets and indexes $1.00, and making final record, at 15 cents per folio, where no indictment was found, disallowed, as follows:

Report	95,735	$1.75

18. For attaching seal of court to copy of orders of court for marshal to pay jurors and witnesses, at 20 cents each, disallowed, as follows:

Report	98,480	$ .80
"	104,285	1.20
"	109,731	.60
"	112,515	1.20
		3.80

19. For entering and filing orders of district attorney discharging witnesses on trial, showing number of days in attendance, disallowed, as follows:

Report	101,785	$3.00
"	104,285	2.90
"	108,417	3.70
"	109,731	1.90
"	112,515	2.10
		13.60

7 20. For making final record in various cases, at 15 cents per folio, disallowed as follows:

Report	104,286	$28.80

21. For taking separate acknowledgments of defendants and sureties to recognizances for court, at 25 cents each, disallowed, as follows:

Report	109,731	$13.65
"	112,515	5.50
"	115,426	5.50
		14.65

22. For entering and filing bills of costs in cases continued, at 10 cents each, disallowed, as follows:

Report	112,515	$3.60

23. For drawing recognizances of defendants in excess of two folios, at 15 cents per folio, disallowed, as follows:

Report	112,515	$4.35
	Total amount claimed	$675.25

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney duly executed by said petitioner and filed herewith to verify said petition; and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHAS. C. LANCASTER.

Subscribed and sworn to before me this 27th day of December, 1889.

ARTHUR C. CLARKE,
Notary Public.

8 III.—*Traverse filed January* 3, 1890.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such cases provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

9 IV.—*Findings of fact and conclusion of law, filed February* 16, 1891.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant, John W. Payne, was a clerk of the United States district court for the western district of North Carolina from the 23 of March, 1882, to June 30, 1889, duly qualified and acting.

II.

His accounts for services and fees during said period, verified by his oath, were presented to the court for approval in the presence of the district attorney, and an order approving the same was entered of record. The accounts thus approved were presented to the accounting officers of the Treasury for payment. Part was paid, but they refused the items included in Finding III.

III.

(1) For entering separate order of court for the payment of each juror and witness for their mileage and attendance, one folio each, at 15 cents; making copy of said order, at 10 cents per folio, for each juror and witness, with certificate, at 15 cents, for the marshal to pay, $39.95.

Jurors and witnesses are discharged at all hours during term time.

$24.95 of said amount is for entering separate orders of the court and making copy of same. The balance is for a certificate to the marshal.

(2) For making dockets and indexes, taxing costs, &c., in various suits on manufacturers' bonds under the internal-revenue law where issue was joined and testimony given, at $3.00 each charge, $1.00 paid by the accounting officers and $2.00 now claimed, $180.00.

$82 of the above amount is for services rendered in 1881, more than six years before suit brought. The balance is within six years.

(3) For recording judgments of court in certain cases on execution docket, from which record a fi. fa. could issue to the marshal at 15 cents per folio, $3.20.

(4) For making a record of appearance of district attorney in various cases pending in the court, one folio each, at 15 cents per folio, $4.20.

$2.70 of the above amount is for recording the appearance of the district attorney in civil cases in which the United States was a party. The rest of the charges is for recording the presence of the district attorney and the marshal after the opening of the court.

(5) For entering orders of court for alias fi. fa. for venditioni exponas, one folio each, at 15 cents per folio, and for issuing writs of alias fi. fa. and venditioni exponas, at $1.00 each, in various cases, $23.35.

(6) For making record entries of recognizances of defendants at 15 cents per folio and entering and filing said recognizances, at 10 cents each, $11.10.

(7) For making docket entries and indexes in case of sci. fa. and other proceedings, where issue was joined but no testimony given, $2.00 charged in each case; $1.00 allowed by the accounting officers and $1.00 now claimed, $6.00.

(8) For entering and filing 170 separate vouchers in the duplicate accounts of U. S. marshal, at 10 cents each, $17.00.

(9) For entering orders of court approving accounts of marshal, clerks of courts, and commissioners, and making certified copies of said orders to accompany said accounts forwarded to the accounting officers of the Treasury and to be attached to the duplicate accounts, at 15 cents per folio, and filing the duplicate account, $3.65.

(10) For services September 15, 1883, in drawing juries with the jury commissioner, at $5.00 per day, $5.00.

(11) In case United States vs. John W. Jessup et al. and fourteen following cases, attaching certificates, at 15 cents each, and seals, at 20 cents each, to copies of writs in each case for marshals to serve, $74.20.

These were civil suits, and an order of court requires certified copies of the process to be served on each defendant under seal of the court.

(12) For entering separate orders of court, excusing jurors, entering orders of court to issue subpœnas, enrolling judgments, entering
12 order for alias capais, entering order for continuance, entering order for discharge of defendant, and entering order for fi. fa., at 15 cents per folio, $38.00.

These were separate orders made by the court and duly entered on the records of the court.

(13) For entering and filing 35 notices of the marshal notifying talismen to appear as jurors at the October term, 1885, at 10 cents each, $3.50.

This notice is treated as voucher that said juror had been served with notice with the miles travelled thereon, as directed.

(14) For entering and filing 1,740 papers in the U. S. courts, and separate papers in cases sent up to court by commissioners, consisting of complaints, warrants, subpœnas, recognizances, of defendants and witnesses, and the evidence of the witnesses as recorded by the commissioner, at 10 cents each, $107.40.

Rules 8 and 19 of the U. S. court requires these papers to be filed with clerk by the commissioner.

(15) In case U. S. vs. Manley B'ckner, making dockets and indexes, at $1.00, and making final record, at 15 cents per folio, where no indictment is found, but returned by grand jury "not a true bill," $1.75.

(16) For attaching seal of court to copy of orders of court for marshal to pay jurors and witnesses for their mileage and attendance, at 20 cents each, $3.80.

(17) For entering and filing orders of district attorney discharging witnesses on trial, at 10 cents each, $13.60.

Rule 26 of the U. S. court provides: United States witnesses shall
13 not receive compensation for attendance upon the court unless they have been duly summoned or recognized, and have a discharge from the district attorney.

(18) For making final records in civil cases, at 15 cents per folio, $28.80.

The rules and practice in the U. S. courts in this State require the final records to be made in both civil and criminal cases.

(19) For taking separate acknowledgments of defendants and sureties to recognizances in court, at 25 cents each, $14.65.

The names are all included in the same recognizance, and though separate in form all are taken at the same time and by the acknowledgment.

(20) For drawing recognizances of defendants in excess of two folios and not exceeding four folios, at 15 cents per folio, $4.35.

IV.

Claimant's compensation if said items were added would not exceed the maximum allowance provided by section 839, Rev. Stats., in any one year in which said services were performed. The said services were all performed by said claimant, and were rendered for defts. less than six years before the commencement of the suit, except as to 882 stated in Item 2.

CONCLUSION OF LAW.

Upon the foregoing findings the court determines as a conclusion of law that the claimant recover the sum of $24.95 in Item 1; the sum of $98

on Item 2; the sum of $2.70 on Item 4; also on Item 5, Item 6, Item 7, Item 8, Item 9, Item 11, Item 12, Item 13, Item 14, Item 15, Item 17, Item 18, and Item 20, amounting to the sum of $538.50; all other items and parts of items disallowed. Judgment will be entered for said sum of five hundred and thirty-eight dollars and fifty cents ($538.50).

BY THE COURT.

14 *Judgment by the court, entered February* 16, 1891.

At a Court of Claims held in the city of Washington on the 16th day of February, A. D. 1891, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said John W. Payne do have and recover of and from the United States the sum of five hundred and thirty-eight dollars and fifty cents ($538\frac{50}{100}$).

BY THE COURT.

15 *Application of defendants for and allowance of appeal to the Supreme Court of the United States.*

From the judgment rendered in the above-entitled cause on the 18th day of February, 1891, in favor of claimant, the defendants, by their Attorney-General, on the 3d day of March, 1891, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Asst. Attorney-General.

Filed and allowed in open court this 3d day of March, 1891.

WILLIAM A. RICHARDSON,
Chief Justice.

16 IN THE COURT OF CLAIMS.

JOHN W. PAYNE
vs.
THE UNITED STATES. } No. 16034.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 10th day of March, A. D. 1891.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed on cover:) Court of Claims. No. 673. The United States, appellant, vs. John W. Payne. Filed March 14, 1891.

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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
JOHN W. PAYNE. } No. 673.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
JOHN W. PAYNE. } No. 673.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

The statement in this case is made in the findings of fact of the court below. (R. 5.) The suit was for certain fees claimed to be due appellee as clerk of the circuit and district courts of the United States for the western district of North Carolina.

ASSIGNMENT OF ERRORS.

1. The court below erred in its conclusions of law upon the facts found that the claimant was entitled to recover for the following items of the findings, to wit: Items Nos. 2, 5, 6, 7, 8, 9, 10, 12, 15, and 20.

2. The court below erred in ordering, adjudging and decreeing that said claimant should have and recover of and from the United States the sum of $538.50.

ARGUMENT.

EXCEPTIONS TO THE ITEMS ALLOWED.

We discuss these items in the order of the findings:

Item 2. The docket fee of $3 is allowed only "on the trial or argument of a cause where issue is joined and testimony given." (Rev. Stat., 828.)

Issue may be joined and testimony given in a civil suit without reaching a trial or argument of the cause. These fees are claimed in civil causes. The testimony may have been given in depositions. We can not infer from the finding that the causes were tried or argued.

Item 5. In this item we make no objection to the fee for issuing the alias writs. But in absence of proof that it required an order of court to issue an alias, it is submitted that this item should not be allowed. Such a writ is usually issued by the clerk upon the precipe of the attorney who wants it. While it might be said that the clerk is not responsible for the order, it is submitted that a practice which causes unnecessary expenses to litigants ought to be disapproved.

Item 6. No objection is made to the charge for entering and filing the recognizances, as they should be filed with the other papers in the causes. The filing of the recognizances shows that they were not taken by the clerk in the court. It follows that any other charge than that for filing and entering is improper. The fifteen-cent-per-

folio fee applies only where the clerk takes and enters the recognizance in the proper record of the court. In such case no filing or filing entry is made.

Item 7. The docket fees are for *causes*. *Scire facias* is not generally regarded as a cause.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. (Bouv. L. Diet. *sub* cause of action.)

The writ generally issues as an incident to the c use in aid of execution of judgments or forfeited recognizances. It is not regarded as the commencement or foundation of an action; hence it is not "a cause" within the meaning of the fee bill. The word "cause," as there used, must have its legal meaning.

Items 8 *and* 9. These charges are for services required by the act of February 22, 1875. (18 Stat. L., 333.) The question involved is presented in the brief for appellants in *United States* v. *Jones*, No. 312, pending in this Court, which has been submitted under Rule 20, at the present term.

Item 10. This service seems to have been performed under the act of June 30, 1879, chap. 52 (21 Stat. L., 43). There is no fee for this service in the fee bill, hence no compensation can be allowed "except in cases otherwise expressly provided by law." (Rev. Stat., 823.) We do not find any express provision of law allowing this per diem to the clerk.

Item 12. Exception is taken not to the whole item, but only to the following charges therein, to wit: (1) Entering orders of court to issue subpœnas; (2) entering order

of court for *alias capias*. For grounds of exception to these charges we refer to the reasons stated in our objection to item 5, *supra*. We respectfully submit that any practice which casts unnecessary expenses upon suitors or defendants in the courts of the United States ought to be avoided.

Item 15. This appears to be a charge for a docket fee where the grand jury ignored the bill and no indictment was found. The item should be disallowed. (*United States* v. *Van Duzee*, 140 U. S. R., 169.)

Item 20. This item is for "drawing recognizances of defendants." It is no part of the duty of a clerk to *draw* recognizances of defendants, and it does not appear that the court ordered him to draw them. The expense of bail falls on defendants, not upon the prosecution, and in such cases the United States are not liable for the costs. When the recognizance is taken in open court by order of the judge the clerk makes the proper entry on the record. The service may then, by liberal construction, be regarded as an entry of an order for which a fee of 15 cents per folio of record made may be allowed at the expense of the United States. We again refer to section 823 of the Revised Statutes to show that Congress expressly limits the compensation of clerks to fees for the services provided for in section 828: "No other compensation shall be taxed and allowed."

In conclusion, we admit that in many suits brought against the United States by officers of the courts to recover compensation for services performed, many items against which we are compelled to argue present equitable claims, that is to say, claims that would ordinarily be regarded as

equitable if their recognition were not prohibited by the statutes. In such cases there is but one course to be followed, both by the courts and counsel, namely, to admit only such charges as are fairly within the statutes, and to avoid strained construction, leaving the remedy, if any there should be, to the legislative department.

Respectfully submitted.

FELIX BRANNIGAN,
Assistant Attorney.

CHARLES H. ALDRICH,
Solicitor-General.

147 U.S. 687

Office Supreme Court U. S.
FILED.
DEC 15 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
JOHN W. PAYNE, APPELLEE.
No. 673.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

M. TOWELL, PRINTER

IN THE

Supreme Court of the United States.

October Term, 1892.

THE UNITED STATES, Appellant,
vs.
JOHN W. PAYNE, Appellee. } No. 673.

Appeal from the Court of Claims.

FEES OF CLERK UNITED STATES COURTS.

BRIEF FOR APPELLEE.

It is contended on behalf of the appellee that all the items of charges included in the judgment of the court below are clearly authorized by the provisions of section 828, Revised Statutes of the United States.

Upon the findings of the court below all the charges included in the judgment were allowed by this Court in the case of U. S. *vs.* Van Duzee, 140 U. S., 169, 199.

The approval of the Court is conclusive in the absence of clear and unequivocal proof of mistake. U. S. *vs.* Jones, 134 U. S., 483.

It is submitted that the appellant has failed to show any mistake in the approval of the Court, and the judgment of the court below should be affirmed.

CHARLES C. LANCASTER,
Counsel for Appellee.